ABDUL KHALID BAKAR SHAH *a*

v.

PARTY ISLAM SE MALAYSIA (PAS) & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[SUIT NO: S2(S3)-23-57-1999]
13 AUGUST 2001

TORT: *Defamation - Newspaper publication - Whether impugned article would lead reasonable people to allude it to the plaintiff - Whether intention of defendants an important consideration - Words - Natural and ordinary meaning - Onus on defendants to prove non-libellous - Evidence of malice* *c*

TORT: *Defamation - Innuendo - Whether words malicious - Whether reputation of plaintiff affected* *d*

TORT: *Defamation - Publication in a newspaper - Liability of proprietor, editor and publisher - Departure from pleaded defence - Fair comment and qualified privilege not pleaded*

TORT: *Damages - Considerations for quantum - Whether affected by refusal to withdraw and express regret* *e*

The plaintiff was a journalist and freelance writer who had served various newspapers and tabloids in different capacities and had eventually ventured into editing and publishing. His publishing house launched a book written by himself entitled "50 Dalil Mengapa Anwar Tidak Boleh Jadi PM" ('50 Dalil'). The 1st defendant was an Islamic political party better known by its Jawi acronym "PAS" and was the proprietor and publisher of its official bilingual newsletter called Harakah of which the 2nd defendant was the editor, the 3rd defendant its printer and the 5th defendant its English editor. The 4th defendant was the writer of the allegedly defamatory article which was the basis of the plaintiff's instant action. *f* *g*

The plaintiff alleged that the defendants had maliciously and with intent to vilify him, written, printed and published or caused to be written, printed and published in Harakah, the offensive and defamatory article "Malaysia Sweeps 10 Oscars" with the sole object of tarnishing the plaintiff's character, reputation and career. The defendants in the first instance denied publication and alternatively claimed that they were not involved in the publication. They refuted the plaintiff's allegations and pleaded that the article was a satire based on fictitious characters which had no derisive reference to any living person including the plaintiff. *h* *i*

Held:

[1] The overriding question was not whether anyone could identify the plaintiff but whether reasonable persons acquainted with him could identify him from the words used. It was not necessary that the defamatory words should refer to the plaintiff by name; it would suffice if he was referred to by means of a description of his physical pecularities. The marked reference to the distinctive colour of the plaintiff's hair and the feigned name had designated the plaintiff in such a way that those who were familiar with him would have understood without a doubt that he was the person the words and description alluded to.

[2] It was inconsequential what the writer meant by any secret reservation in his mind but what was conveyed to, and understood to mean by, those who read it. The words complained of were defamatory in their natural and ordinary meaning and the onus was on the defendants to prove otherwise. The defendants' plea that the words complained of in the impugned article were jocular in nature and were meant as entertainment was devoid of merit; they should not be permitted to murder the plaintiff's reputation, even in jest. Words published, however apparently innocent, can be defamatory when read in reference to the circumstances and context in which they appear. There was no doubt that "Pulp Dalil" referred, *albeit* by insinuation, to "50 Dalil" and to designate it as badly written trash imputed professional misconduct. This was an allegation of fact which could not be protected or shielded by a plea of fair comment. The article's reference to the principal character as a small-time hoodlum meant and were understood to mean that the plaintiff was a common criminal terrorising the streets. It was actionable *per se* to impute to the plaintiff the commission of a crime for which he would suffer corporal punishment. The bare allegation that the plaintiff had failed his university entrance test and was unable to recite the alphabets without adducing supportive evidence was an affront to his integrity and prejudicial and injurious to his office, profession and trade. To falsely label the plaintiff, a journalist of repute, in such derogatory terms was not only libellous but had affected him adversely in the estimation of right thinking members of society and tended to put him in public scandal, odium and contempt. The impugned article had imputed that the plaintiff, having failed in his attempt to acquire tertiary education, had sought comfort and solace in the arms of a prostitute. This was an imputation of sexual immorality and unchaste behaviour unbecoming of a Muslim and the plaintiff being of the Muslim faith would be faced with social disfavour and abhorrence from the average reader and like members of his faith and community. The defendants had published words to mean that the plaintiff had plagiarised

the book "50 Dalil" although by their own admission they knew that the book was in fact written by the plaintiff. To make such a grievous charge and accusation having no belief in the truth of the accusation was evidence of malice on the part of the defendants.

[3] Any imputation which tended to invite hatred or abhorrence was defamatory – even if the plaintiff should fail to prove the meaning ascribed in the innuendo, he would not be precluded from succeeding in the action as the words were defamatory in their natural and ordinary meaning.

[4] Where there is a publication containing false news there is a presumption of malicious intent. The defendants had been callous and indifferent to promulgating injurious falsehood and oblivious to the falsity of the published words. They had not pleaded fair comment or qualified privilege and had chosen to ignore the plaintiff's request to withdraw the untrue article and tender an apology. Such reckless and indifferent conduct was clearly malicious.

[5] Where a libel has been published in a newspaper all and sundry who participated in publishing it or procuring its publication are *prima facie* liable. The 1st defendant as proprietor and publisher of the impugned article, the 2nd defendant as editor, the 5th defendant as the English editor and the 3rd defendant as printer were liable for the libel.

[6] The defendants abandoned their pleaded defence that they had no knowledge of the plaintiff's standing as a journalist, freelance writer and author of "50 Dalil". Instead they submitted that the plaintiff's loss of reputation was the result of his own controversial writings regarding the former Deputy Prime Minister, which offended the custom, tradition and culture of the Malay community. This was a frivolous and unwelcome departure from their pleaded case.

[7] No man may disparage or destroy the reputation of another and every man has a right to have his good name maintained unimpaired – a right absolute and good against all the world. General damages therefore ought to follow the consequences of the defendants' conduct.

[Damages of RM200,000 awarded.]

Case(s) referred to:

Adam v. Ward [1917] AC 309 ***(refd)***
Bryce v. Rusden [1886] 2 TLR 435 ***(refd)***
Citizens' Life Assurance Co Ltd v. Brown [1904] AC 423 ***(refd)***
Cook v. Ward [1830] 130 ER 1338 ***(refd)***
Cuddington v. Wilkins [1616] Hobart 67 ***(refd)***
David Syme & Co v. Canavan [1918] 25 CLR 234 ***(refd)***
Donoghue v. Hayes [1831] Hayes (Ir Ex) R 265 ***(foll)***
Egger v. Viscount Chelmsford & Ors [1965] 1 QB 248 ***(refd)***
Haire v. Wilson [1829] 9 B & C 643 ***(refd)***
Hellwig v. Mitchell [1910] 1 KB 609 ***(refd)***
Hulton v. Jones [1909] 2 KB 444 ***(refd)***
J'Anson v. Stuart [1737] ITR 743 ***(foll)***
Lambert v. Thomson [1937] 2 DLR 662 ***(refd)***
Lee Kuan Yew v. Derek Gwyn Davis [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 ***(foll)***
Limpus v. The General Omnibus Co [1863] 7 LT 641 ***(refd)***
Marks v. Samuel [1904] 2 KB 287 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(refd)***
Roach v. Garvan [1742] 21 ER 480 ***(refd)***
Scott v. Sampson [1882] 8 QBD 491 ***(refd)***
Shapiro v. La Morta [1923] All ER Rep 378 ***(refd)***
St James' Evening Post: Case No 291; Roach v. Garvan AKT 469 ***(foll)***
The Capital and Counties Bank Ltd v. George Henty & Sons [1882] 2 TLR 741 ***(refd)***
Thomas v. Bradbury, Agnew & Co Ltd & Anor [1906] 2 KB 627 ***(refd)***
Watkin v. Hall [1868] LR 3 QB 396 ***(refd)***
Webb v. Beaven [1883] 11 QBD 609 ***(refd)***

Legislation referred to:

Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Printing Presses and Publications Act 1984, s. 8A(1), (2)
Rules of the High Court 1980, O. 2 r. 2(1)
Societies Act 1966, s. 9(c)

For the plaintiff - En Shamsul-Bahrain Ibrahim; M/s Skrine & Co
For the 1st, 2nd, & 5th defendants - Mohamed Hanipa Maidin; M/s Mohamed Hanifa & Assoc
For the 3rd defendant - KA Gan (Adlin Majid); M/s Lee Hishamuddin

Reported by K Ganesh

JUDGMENT

RK Nathan J:

Facts

The plaintiff is, and was a journalist and a free-lance writer. Initially, he was employed by Utusan Melayu newspapers when at one time he was its representative in London. As a founder member of the National Union of Journalists, he was made its first secretary and sat on its national committee. He then left Utusan Melayu and launched his daily newspaper, Harian Nasional and Mingguan Pertama. This was followed by a twice-weekly tabloid, Era Ekonomi. From a twice-monthly English-Malay tabloid Bulletin Langkawi he ventured into magazines such as Seri Dewi, Travel Adviser and Motor. In most cases he was the editor.

He named his publishing company as Pulau Legenda. In May 1998 Media Pulau Legenda published his book called "50 Dalil Mengapa Anwar Tidak Boleh Jadi PM" ("50 Dalil"). Taking advantage of the presence of Malay politicians in town in June 1998, he launched "50 Dalil" at the Putra World Trade Centre to coincide with the United Malay National Organisation's (UMNO's) General Assembly. "50 Dalil" became an instant hit.

On 7 June 1998 Dato' Seri Anwar Ibrahim issued a writ against the plaintiff and Media Pulau Legenda in the Kuala Lumpur High Court by way of Civil Suit No. S1-23-40-1998 and on the same day an *ex parte* injunction was granted by Dato' Wira Haji Mohd Noor bin Haji Ahmad J (as he then was) restraining the plaintiff from "menulis, mengulangi, mencetak, menerbit, mengedarkan atau menyebabkan supaya ditulis, diulangi, dicetak, diterbit dan diedarkan perkataan-perkataan fitnah, gambar-gambar berserta perkataan-perkataan fitnah tersebut atau perkataan yang seumpamanya tentang dan berhubung dengan plaintif" (meaning Dato' Seri Anwar Ibrahim). The plaintiff has filed an appeal against that decision and the matter is pending before the Court of Appeal.

In *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215, the accused was charged with four counts of corrupt practices under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The charges alleged that the accused, while being a member of the Administration, had unlawfully used his public position to his advantage, in that he had directed two senior police officers to obtain four written statements from Azizan Abu Bakar and Ummi Hafilda Ali denying their allegations of sexual misconduct and sodomy against him, and had by that saved himself from embarrassment and from criminal proceedings in contravention of s. 2(1) of the Ordinance. The accused was found guilty on all the four charges and sentenced accordingly.

The 1st defendant is a political party called Parti Islam Se Malaysia otherwise known from its Jawi acronym as "PAS" registered with the Registrar of Societies and formed on the basis of Islam with two objectives, namely, to struggle for the creation of a society and government embodying Islamic values and its principles towards achieving the blessing of Allah and to defend the sanctity of Islam and the independence and the sovereignty of the country.

It is enshrined in the 1st defendant's constitution that the said objectives are to be achieved through the following efforts, namely, to appeal upon all mankind to heed the Islamic religious laws of Allah and the Sunnah of the Prophet through preachings, be it orally, in writing or by practice, and to strive for Islam as a holy practice and as a religious law and to formulate it as a political and national guide as well as to introduce Islamic values in efforts to uphold justice and development in all fields including governance, administration, economics and social education. The defendant's appeals and struggles are channelled through a newsletter called Harakah. Whilst the 1st defendant is the proprietor and publisher, the 2nd defendant is its editor and the 3rd defendant is its printer and the 5th defendant was at all material times its English editor. Judgment in default of appearance had already been obtained against the 4th defendant, the writer of the article in question. The said Harakah is the official newsletter of PAS having a wide circulation throughout the country.

The plaintiff contends that in its issue of the said newsletter of 29 March 1999 under the heading "Malaysia Sweeps 10 Oscars", the defendants named herein, maliciously and with intent to vilify him, wrote, printed and published, or caused to be written, printed and published, in the issue of the said newsletter dated that day, of the plaintiff and of him in the way of his said occupation and employment and in relation to his character, conduct, journalistic ability, credibility, reputation therein and with the object of destroying the plaintiff's character, reputation and journalist career the following defamatory words:

Best Original Screenplay: "Pulp Dalil"

> Based loosely on the Quentin Tarantino hit "Pulp Fiction", the film tells the story of a small-time hoodlum, Caled Jeffry, who leaves his life of crime on the streets to embark upon a life of crime in literature. He fails his university entrance test when he is unable to recite the alphabet (he could only manage to get to "D"), but is consoled by Ummi Thurman Ali, a small-time hooker obsessed with Deputy Prime Ministers. She helps Jeffry embark upon his super-novel – she writing the stories and him dotting the "i"s – after the two of them are inspired by reading a copy of the National Enquirer. They managed to publish their book "Pulp Dalil" when a short balding man with a liking for small big-breasted women funds its publication. The book becomes an overnight hit, and Jeffry achieves his lifetime ambition of having orange hair.

It is the plaintiff's case that the words complained of, derisively referred to him and his book "50 Dalil". The plaintiff contended that the defendants had made publication of the defamatory words through Harakah.

The Defence

In the first instance the defendants denied publication. Alternatively they pleaded that they were not involved in the publication. They also pleaded that the publication was either a satire or fantasy, and was not a report on human beings or incidents of real happenings and that all the characters did not refer to any human beings including the plaintiff. They also denied that the article was written falsely and maliciously and with intent to vilify the plaintiff and of him in the way of his said occupation and employment and in relation to his character, conduct, journalistic ability, credibility, reputation therein. They also denied that it was published and printed with the object of destroying the plaintiff's character, reputation and journalist career. At the close of the trial, counsel for the 3rd defendant, namely, the printer, withdrew his claim for indemnity against the 1st defendant.

Findings Of The Court

Identity Of The Plaintiff

It is the plaintiff's case that the name "Caled Jeffry" referred to in the publication was in fact the feigned name of Khalid Jafri, the plaintiff himself. Reading the context of the impugned publication in its entirety I have no hesitation in concluding that the name "Caled Jeffry" was indeed meant to refer to the plaintiff and no other. In *St. James' Evening Post: Case No. 291; Roach v. Garvan* AKT 469 at 470 the court held that "even feigned names have been construed a libel upon those persons who were really meant to be libelled". The question is not whether anyone did identify the plaintiff but whether persons who were acquainted with the plaintiff could identify him from the words used. I am of the view that it is not necessary that the words should refer to the plaintiff by name, provided that the words would be understood by reasonable people to refer to the plaintiff. The court will have to consider whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person alluded to. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person referred to.

In *David Syme & Co v. Canavan* [1918] 25 CLR 234 the High Court of Australia found that the words complained of were defamatory, that is to say, that they tended to create a bad opinion of any person to whom they could be shown to refer to. However, the court found that the words complained of

did not refer to the plaintiff. In determining the identity of the plaintiff, Isaacs J applied the following test at p. 238:

> The test is whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstance the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

It is immaterial that the defendant did not intend to refer to the plaintiff, or did not even know of his existence. The question is: Would the words complained of be understood by reasonable people who knew the plaintiff to refer to him? If so, they are published of and concerning the plaintiff, no matter what the intention of the defendant may have been (see *Hulton v. Jones* [1909] 2 KB 444 (CA); affirmed [1910] AC 20 (HL)).

The test in every case is: Would the words be understood by reasonable people to refer to the plaintiff? Applying this test, would the words complained of be understood by the delegates at the UMNO General Assembly in June 1998, the readers of "50 Dalil", the readers of Harian Nasional, Mingguan Pertama, Era Ekonomi, Buletin Langkawi, Seri Dewi, Travel Adviser and Motor, to refer to the plaintiff? The answer, in my view, is in the affirmative. The name Khalid Jafri is synonymous with "50 Dalil", the book which enjoyed prominence at the trial of Dato' Seri Anwar Ibrahim. The words and phrases in the article themselves served as pointers to the identity of the person defamed, namely, the plaintiff. Moreover, the plaintiff was described by the initial and last stresses and intonations of his first and last name. In *Roach v. Garvan* [1742] 21 ER 480 the plaintiff was described by his initial letters and yet it was considered by the court as being sufficient.

The last sentence in the article called "Best Original Screenplay: 'Pulp Dalil'" reads:

> The book becomes an overnight hit, and Jeffry achieves his lifetime ambition of having orange hair.

With regard to the reference to "orange hair", the 5th defendant in his evidence, identified the peculiarity of the plaintiff's hair as "perang". (*The Kamus Lengkap* at p. 806 describes "perang" as blonde, brunette, dark brown, reddish-black, reddish-yellow.)

Therefore through the 5th defendant, it is now established that the peculiar colour of the hair is the physical peculiarity of the plaintiff. In *J'Anson v. Stuart* [1737] ITR 743 it was held that it is not necessary that the words should refer to the plaintiff by name; it is sufficient if he be referred to by means of a description of his physical peculiarities. In that case a libel was published on a "diabolical character" who, "like Polyphemus, the man-eater, has but one eye, and is well-known to all persons acquainted with the name of a certain noble circumnavigator". The plaintiff had but one eye, and his name was J'Anson. The Court held that it was clear that he was the person referred to.

I have no hesitation in holding that the libel has indeed designated the plaintiff in such a way that those who know him would have understood that he was the person referred to. The entire article "Malaysia Sweeps 10 Oscars" as a whole refers to the principal players both in the "50 Dalil" and in the criminal trial of Dato' Seri Anwar Ibrahim.

Natural and Ordinary Meaning

In determining whether the words are capable of defamatory meaning, the Court will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence.

In their defence, the defendants plead that the words were meant to be an entertainment – "dengan tujuan hiburan semata-mata". It is trite law that the meaning in which the defendants intended the words to be understood, though material on the question of damages is immaterial in determining whether the words were defamatory or not. If the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act (see *Haire v. Wilson* [1829] 9 B&C 643).

The question on an action for words is not what the party using them, considered their meaning by any secret reservation in his own mind, but what was meant to have been understood as their meaning, by the party to whom he uttered them. It is not what the defendant intended, but what a reasonable man, knowing the circumstances in which the words were published, would understand to be the meaning.

In my view the test to be applied is to see the meaning and inference that would be drawn naturally upon reading the impugned article by a person of reasonable intelligence. So in actions based on libel, the meaning of the writer is quite immaterial. It is not a question as to what the writer meant but what he conveyed to those who read it. It is therefore my judgment that the plaintiff in this case is entitled to plead that in their natural and ordinary meaning the words complained of meant that the plaintiff was a rowdy hooligan, a thug

and a gangster who has now graduated from the streets of gangland to the literary world and that although he is stupid and illiterate yet he attempted to acquire tertiary education and being unsuccessful, and in grief he debased himself by seeking solace in the company of a prostitute. He had hoodwinked society by holding himself out as the author of the book by passing off the works of Ummi Hafilda bte Ali as his own.

When the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication. The onus lies on the defendant to prove from the context in which the words were used, or from the manner of their publication or other facts known to those to whom the words were published, that the words could not be understood by a reasonable man to convey the imputation suggested by the mere consideration of the words themselves. The plea of the defendants therefore that the words complained of were to be understood as a joke or as in no sense defamatory of the plaintiff cannot be sustained. The 3rd defendant cannot discharge this burden of proof merely by pleading that it meant it as a joke and the 1st, 2nd and 5th defendants' alternate plea that the words were meant to be a satire will not exculpate them from liability towards the plaintiff. In *Donoghue v. Hayes* [1831] Hayes (Ir.Ex.) R 265 Joy CB said at p. 265 as follows:

> The principle is clear, that a person shall not be allowed to murder another's reputation in jest. But if words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done, and consequently no action would lie.

And in the same case Foster B added at p. 267 as follows:

> The whole question is whether the jocularity was in the mind of the defendant alone, or was shared by the bystanders.

Specific Charges By The Plaintiff

(a) Pulp Dalil

If the libel is contained in a paragraph in a newspaper, not only the paragraph but also the heading must be taken into account. Words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the circumstances in which they were written and with reference to the context in which they appear. There is no doubt that "Pulp Dalil" refers to "50 Dalil" and to say, *albeit*, by way of insinuation that "50 Dalil" is nothing but trash and that it is badly written, imputes professional misconduct. If the facts be correctly stated the reader is in a position to form his own conclusion. But, if a writer chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact

that is before the reader, then such an expression of opinion depends only upon the writer's own authority, and stands in the same position as an allegation of fact. It cannot in my view be protected by a plea of fair comment.

(b) Small Time Hoodlum

I have no hesitation in holding that in their natural and ordinary meaning the words meant and were understood to mean that the plaintiff was a rowdy hooligan, a thug and a gangster and a common criminal, terrorising the streets. Words which impute to the plaintiff the commission of a crime for which he would suffer "corporally by way of punishment" are actionable without proof of special damages (see *Hellwig v. Mitchell* [1910] 1 KB 609).

It is actionable to call a man "a thief" for such words impute an indictable offence. In *Cuddington v. Wilkins* [1616] Hobart 67, 81 the court held that it was actionable to call a man "a thief" even though after he had been convicted of larceny, he had been pardoned because by pardoning him the King had cleared the person of the crime.

It has also been held that the exact offence need not be specified. Words involving a general charge of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment (see *Webb v. Beaven* [1883] 11 QBD 609).

It has also been held that it is not necessary that the words should have been intended by the speaker to charge a crime; it is sufficient if the hearers might reasonably have understood them as so doing (see *Marks v. Samuel* [1904] 2 KB 287 at p. 290).

(c) Fails His University Entrance Test

To allege that the plaintiff had failed his university entrance test and without adducing any evidence to this effect and alleging further that the plaintiff could not recite the alphabets fully but could only make it to the letter D is certainly an affront to his integrity as a journalist. Words, which directly tend to injure or prejudice the reputation of the plaintiff in the way of any office held by him, or in the way of any profession or trade carried on by him, are actionable without proof of special damage. The plaintiff has alleged in his statement of claim and testified that he is and was at all material times a journalist and a freelance writer and the author of "50 Dalil". He has also alleged and I accept his evidence that the words complained of were published with reference to his character and conduct in such office, profession and calling.

To say of a journalist who has produced and published periodicals such as Seri Dewi, Era Ekonomi, been an editor-in-chief of Travel Adviser magazine, chief editor of Motor Monthly, editor of the bilingual newspaper Bulletin Langkawi, in such degrogatory terms, is in my view libellous of him, which would affect him adversely in the estimation of reasonable people generally. This passage alone exposes him to ridicule and contempt. This part of the article has a tendency to injure him in his office, profession and trade. This statement is false about him to his discredit. The words tend to lower him in the estimation of right thinking members of society generally. The libel against the plaintiff is clearly false about him to his discredit.

It is apt to quote Cave J in *Scott v. Sampson* [1882] 8 QBD 491 at p. 503 wherein his Lordship said as follows:

> … Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statement to his discredit.

During the cross-examination DW1, the 2nd defendant (Zulkifli bin Sulong), agreed that the article complained of suggested that Caled Jeffry was leading a life of crime on the street albeit "small time". This answer was echoed by DW2 (the MP Nasharudin b. Mat Isa) when he agreed that there was a suggestion in the article that Caled Jeffry was leading a life of crime on the streets. This clearly is an imputation of crime. It is not necessary that the alleged crime should be stated with all the technicality or precision of an indictment; it is enough if the crime be imputed in the ordinary language usually employed to denote it in lay conversation. Further, if criminal conduct is distinctly imputed, it is not necessary in my view to specify the crime imputed.

(d) Fails The Exam And Is Consoled By … A Small Time Hooker

In their natural and ordinary meaning the words meant and were understood to mean that the plaintiff, having unsuccessfully attempted to acquire tertiary education and in grief, debased himself by engaging in sexual activities with a prostitute. What type of man seeks comfort in a prostitute when in distress? Such a man reduces himself to the level of his comforter. The imputation of sexual immorality is a gross and grievous attack on one's personal character. It is libellous to write and publish of a man that he is immoral.

The imputation of enjoying or gaining comfort from a prostitute is an imputation of unchaste behaviour. The false imputation of unchastity to a Muslim man, will bring him into social disfavour and it could be a ground

for divorce. The imputation is more wounding and more likely to incite abhorrence on the part of the average reasonable people more so the readers of Harakah.

(e) "She writing the stories and him dotting the i's"

In their natural and ordinary meaning these words meant and were understood to mean that the plaintiff had hoodwinked society by holding himself out as the author of "50 Dalil". This is a serious charge against a journalist. This is an accusation of plagiarism – an act of using someone else's work as one's own.

The Code of Professional Conduct for National Union of Journalists Malaysia (NUSM) warns members against plagiarism. Code 7 of the said Code of Professional Conduct, *inter alia*, reads:

> 7. He will regard as grave professional offences the following:
>
> Plagiarism.
>
> Calumny, slander, libel and unfounded accusations.

The defendants know and in fact admitted during the trial that it was common knowledge that "50 Dalil" was written by the plaintiff. The issue of whether "50 Dalil" was written by Ummi Hafilda bte Ali was brought up during the criminal trial of Dato' Seri Anwar Ibrahim and has become part of the judgment of Augustine Paul J in *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215. Ummi Hafilda affirmed a Statutory Declaration and part of it at page 312 reads as follows:

> I am not involved nor have anything to do whatsoever with the book "50 Dalil Mengapa Anwar Tidak Boleh Jadi Perdana Menteri" nor with the author of the book. I had not in any way contributed to nor colluded with its publication although some elements are now trying to implicate me in order to give credibility to the contents of the book. I do not know the author of the book and have no contact or communication with him directly or indirectly.

Any evidence which goes to show that the defendants had no belief in the truth of their statement will be evidence of malice.

Innuendo

By the words complained of the defendants meant and were understood to mean that the plaintiff was a common criminal, and an undesirable element indulging in criminal activities and has committed crimes punishable by imprisonment. By the said words the defendants meant and were understood to mean that the plaintiff was illiterate and foolish and a complete moron and

therefore unable to read even the Qu'ran and perform his fundamental duties as a Muslim. He was an adulterer and guilty of unchastity and of immoral conduct. He portrayed himself as the author of "50 Dalil" and was therefore guilty of fraud.

The plaintiff has not been shown to be violent and has no criminal records. The phrase "Pulp Dalil" in the sub-heading insinuated that the "50 Dalil" is a pulp fiction about sex and violent crime containing sensational materials and was therefore considered as trash. The words complained of have certainly caused the plaintiff to be hated and despised. Any imputation which may tend to cause a person to be hated or despised is defamatory of him.

In *The Capital and Counties Bank Limited v. George Henty & Sons* [1882] 2 TLR 741 Lord Blackburn said at p. 771 as follows:

> … But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

The plaintiff is claiming that the words complained of were understood to be defamatory in an extended meaning by those persons having knowledge of some special facts or matters and that those persons were represented by PW2 (Alwi bin Haji Yaakob). The natural and ordinary meaning and the legal innuendo can give rise to separate causes of action (see *Watkin v. Hall* [1868] LR 3 QB 396). That case laid down the principle that every declaration in libel or slander is to be taken as containing two counts, one with and the other without an innuendo, and it is sufficient for the plaintiff to prove either to succeed. It follows that if the plaintiff can satisfy the court that the words are actionable either with or without innuendo, he is entitled to recover. I am of the view that even if the plaintiff fails to prove the meaning ascribed in the innuendo that will not necessarily preclude him from succeeding in the action, for he can, in such a case contend that the words are defamatory in their natural and ordinary meaning.

No Apology

The plaintiff issued a letter through his solicitors before action. Its object was to enable the defendants to correct or to withdraw the statements. By that letter the plaintiff sought an apology and invited proposals as to damages. The

defendants chose to ignore the said letter. A refusal to withdraw and express regret for statements made without foundation is a matter which the court may take into consideration when assessing damages (see *Bryce v. Rusden* [1886] 2 TLR 435).

Malice

The publication of defamatory statement gives rise *prima facie*, to a cause of action. The law presumes in the plaintiff's favour that the words are false, unless and until the defendant proves to the contrary. Here the defendants have not proved to the contrary. The plaintiff also does not have to prove malice on the part of the defendant unless, and until the court rules that the words were published on a privileged occasion. In the absence of such plea, this proviso does not arise. In defamation the law presumes malice from the mere act of the defendant publishing such defamatory matter.

In *Adam v. Ward* [1917] AC 309 Lord Finley LC said at p. 318 as follows:

> … from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion.

Malice is not only provable by extrinsic evidence, it may be "inferred from the terms of the alleged libel itself" (see *Thomas v. Bradbury, Agnew & Co, Limited & Anor* [1906] 2 KB 627).

Contrary to the objectives as enshrined in the first defendant's constitution, namely, to appeal to all mankind to heed the Islamic religious laws of Allah and the Sunnah of the Prophet through preachings and to strive for Islam as a holy practice and as a religious law and to formulate it as a political and natural guide as well as to introduce Islamic values in efforts to uphold justice and development in all fields, including governance, administration, economics and social as well as education, and such appeals being channelled through a newsletter called Harakah, the defendants falsely and maliciously and with intent to vilify, wrote, printed and published the words complained of. I hold that it was an act of sensationalism solely motivated by a desire to boost the sale of the newspaper and to live off the ruin of the plaintiff's calling, pursuit and trade and the loss of his reputation. I find that the defendants were not only callous of conduct but also indifferent to promulgating injurious falsehood and oblivious to the fact that the words were untrue and that the said words were calculated to disparage the plaintiff in his profession. The fact that the language of the defendants is unnecessarily strong and entirely disproportionate to the exigency of the occasion is in my view evidence of malice. The defendants published the words without considering or caring whether they were true or not; they were indifferent to the truth. In that sense, they acted recklessly. Such conduct of the defendants is clearly evidence of malice.

Questions regarding the defendants' conduct come flooding to my mind:

(1) Did the defendants honestly hold the opinion that the plaintiff was a small-time hoodlum leading his life of crime in the streets?

(2) Did the defendants honestly hold the opinion that the plaintiff was unable to recite the alphabet and that he could only manage to get to D?

(3) Did the defendants honestly hold the opinion that Khalid Jafri was in the habit of seeking consolation, every time he was in grief, feeling sad and disappointed, from a hooker?

The defendants do not say that those words were fair comment nor that they were published on an occasion of qualified privilege. In the absence of such pleas, the presumption of malice arises from the publication. The language used by the defendants is very strong and hurtful. It is sometimes said that the strength of the language used may itself be evidence that the defendants were actuated by express malice. It is my judgment that no honest minded man could have made these statements.

The defendants and their witnesses maintained, in line with the pleadings, that the words complained of were "gurauan" or spoken in jest, a satire, a fantasy or spoken to amuse. In *Cook v. Ward* [1830] 130 ER 1338, the plaintiff told a laughable story against himself in company. The defendant published it in his newspapers to amuse his readers, assuming that the plaintiff would not object. The plaintiff recovered £10 damages, for though he told it of himself to his friends, the court held that he by no means courted public ridicule.

The words complained of formed part of a newspaper report from Los Angeles on the 71st Annual Academy Awards Ceremony compiled by Harakah's correspondent on 21 March 1999 bringing the news that "Malaysia Sweeps 10 Oscars!". The defendants admitted that these things did not happen and that it was merely a joke. The so-called joke contained the following ingredients:

(1) There is a publication in a newspaper.

(2) The publication contained false news.

(3) The defendants published the false news.

(4) The defendants who are the publishers, printers, editors and the writer are the publishers of those false news.

In criminal law where there is a publication containing false news, there is a presumption that the accused maliciously published the said false news. Under s. 8A(1), sub-s. 2 of the Printing Presses and Publications Act 1984, malice shall be presumed in default of evidence showing that prior to publication the accused took reasonable measures to verify the truth of the news.

In urging this court to believe that the report was published in jest, the defendants have therefore impliedly admitted that it was untrue. There is no doubt that the report was false. The malice essential to support the action is an intention to injure the plaintiff. Such an intention will be inferred on proof that the words were calculated to produce actual damage, and that the defendants knew that they were false when they published them, or were reckless, as to whether they were false or not (see *Shapiro v. La Morta* [1923] All ER Rep. 378).

In *Lee Kuan Yew v. Derek Gwyn Davis* [1990] 1 CLJ 583 there were four defendants all connected with an article published in the Far Eastern Economic Review of 17 December 1987. The 1st defendant was the editor, 2nd defendant was the author of the article entitled "New Light On Detention" whilst the 3rd and 4th defendants were the publishers and the printers respectively. The defence of fair comment failed for want of merit and sufficient substratum of facts on which to base the comment. In dealing with express malice LP Thean J said that if express malice was proved against the editor and the author of the article, then the publishers would be liable vicariously on the basis of *respondeat superior*. The learned judge was persuaded by the words of Lord Denning MR in *Egger v. Viscount Chelmsford & Ors* [1965] 1 QB 248 CA at 265:

> A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

The learned judge in *Lee Kuan Yew* considered first the question of express malice as regards the editor and the author together. As the editor he would have considerable say on the content of the article, and in him would rest the final decision whether or not the article or any part thereof should be published. Both of them were in the employment of the publishers. In conclusion, on the materials before the court, the learned judge found that the editor and the author were actuated by express malice. Accordingly, the publishers were affected by the express malice of the editor and the author. They were vicariously liable.

In dealing with the printers, clearly they were not involved in writing or editing. However, the printers printed the article without verifying whether the contents thereof were true or false. Notwithstanding the fact that there was an agreement subsisting between the publishers and the printers wholly for commercial reasons, the printers had put themselves in the shoes of the publishers and must stand or fall with the publishers. They printed the article, without considering or caring whether it was true or false. They were indifferent to the truth. They were equated with a publisher who published materials or articles without considering or caring whether they were true or false. In that sense, they acted recklessly. For those reasons the printers are also affected by express malice.

Liability Of The Proprietor

The 1st defendant is sued as a proprietor and publisher of the newsletter and aptly represented by its Secretary-General and a Member of Parliament, Y.B. Nasharudin bin Mat Isa, who on 9 December 1999 submitted an application for a permit to publish Harakah on behalf of the 1st defendant. The permit, I take it, was duly issued by the Ministry of Home Affairs for the following:

> To propagate information on the organisation and current news with the 3rd defendant named as their printer.

It is made available to the public at the newspaper stands for a price of RM1.30 although it ought to be sold only to members. A paper which contained "public news, intelligence or occurrences" is a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind, or the advocacy of particular principles or views. In this particular case its purpose is to strive for Islam as a holy practice and, *inter alia*, to formulate it as a political and natural guide channelled through Harakah. It can therefore be accepted that the libel was authorised by the first defendant. Any person who engages another, whether as a servant or as an agent to do an act on his behalf is civilly liable not only for any wrongful act which he specifically authorises his servant or agent to commit, but for any wrongful act committed by his servant or agent whilst acting within the scope of their respective employment (see *Citizens' Life Assurance Co Ltd v. Brown* [1904] AC 423 PC).

As far as the proprietor of a newspaper is concerned it will be civilly liable for any libel appearing in its column even if it is ignorant of what has been written (see *Limpus v. The General Omnibus Co* [1863] 7 LT 641).

Liability of Editor One

Where a libel is published in a newspaper, everyone who takes a part in publishing it, or in procuring its publication is *prima facie* liable. Thus the 2nd defendant (Zulkifli bin Sulong) as the editor of Harakah is *prima facie* liable.

By para. 3 of the amended defence the 2nd defendant denied that he was the chief editor. However, under cross-examination the 2nd defendant admitted that he was only appointed to the post of editor Harakah since 1997 and that prior to that he was not the editor. Counsel for the plaintiff specifically challenged the 2nd defendant during cross-examination as follows:

Q: Tadi anda kata nama jawatan yang anda pegang ialah Editor Satu. Mengapa nama jawatan ini tidak disebut dalam pembelaan anda?

A: Saya tidak tahu.

With this answer I have no hesitation in finding that he was the editor of Harakah at the material time.

Liability Of The English Editor

Harakah is a bilingual newspaper, containing news both in Bahasa Malaysia and in English. The English section has its own editor in the 5th defendant. To borrow his own words he was the "pengarang berita bahagian Bahasa Inggeris akhbar Harakah. … Tugas saya … mengarang berita dalam Bahasa Inggeris bagi edisi Bahasa Inggeris Harakah". The question is, what is "pengarang berita"? According to Kamus Lengkap, Edisi Terbaru, Disemak dan Diperluaskan, "pengarang berita" is newspaper editor. So, as far as this court is concerned, the 5th defendant is the newspaper editor of Harakah.

When asked by his counsel with regard to the caption "Malaysia Sweeps 10 Oscars" gleefully he said, "Saya amat meminati tulisan tersebut". He denied that the article was a report. When pressed by his counsel as to the reason for his belief, he said the characters were fictitious. But during cross-examination, when shown exh. D8 (a reproduction of D2) he identified Tun Ghaffar Baba, Dato' Seri Anwar Ibrahim and Datin Seri Wan Azizah Ismail, with certainty. When asked to identify Dato' Mohamed Rahmat, he giggled and said, "Not sure". He was also not sure when asked to identify Dato' Seri Sanusi Junid, Dato' Sabaruddin Chik, Tan Seri Abdul Rahim Noor and Tun Daim Zainuddin in exh. D8.

Liability Of The Printer

Everyone who writes, prints or publishes a libel, or is in any way responsible for it being written, printed or published may be sued by the person defamed. And to such an action it is no defence for the printer to say that he was given very little time to peruse the contents. He cannot plead that he never read the libellous words either.

Where libel is published in a newspaper, everyone who plays a part in publishing it, is *prima facie* liable. Thus the printer of a newspaper is *prima facie* liable for any libel which appears in its columns. All persons concerned in the commission of a joint tort are jointly liable for all the damages caused by it. In *Lambert v. Thomson* [1937] 2 DLR 662 the Appeal Court of Canada held that the gist of the libel is the publication not the writing, and all those who participate in publishing and circulating the libellous matter, are joint tortfeasors.

Although the printers were not involved in writing or editing they however printed the article complained of without verifying whether the contents thereof were true or false. Although there was no formal agreement between the publishers and the printers nevertheless there was a loose arrangement between them wholly for commercial reasons. This evidence was adduced during cross-examination when DW4 (the proprietor of the 3rd defendant) agreed that their relationship was purely on commercial basis. Thus the printers had put themselves in the shoes of the publishers and must stand or fall with the publishers. They printed the article without considering or caring whether it was true or false. They were indifferent to the truth. DW4 also agreed to a suggestion that the printers had made huge profits out of the printing of Harakah. Therefore in that sense they have obtained financial gain out of the contract which they could refuse to perform, when occasions warranted. For those reasons they are also liable in damages. The arrangement between them was wholly for commercial purposes. In reply to a question, DW4 admitted that the printers could refuse to print the assignment if they chose to.

The Defences In General

It would seem that the 1st, 2nd, 3rd and 5th defendants have abandoned their pleaded defence that they had no knowledge that the plaintiff was at all material times a journalist and a freelance writer and author of "50 Dalil" when in their evidence the defence witnesses stated that the loss of reputation, if any, suffered by the plaintiff was due to his own writings as contained in "50 Dalil" when he made serious allegations against Dato' Seri Anwar Ibrahim. They contended that these writings had lowered him in the estimation of his fellow Muslims. I find that such evidence is indeed a departure from their pleaded case.

The 1st, 2nd and 5th defendants' plea was that the words complained of are incapable of bearing any defamatory meaning. However, I find that the said defendants had failed to explain in what sense the said words were understood by them. In dealing with para. 8 of the amended statement of claim that the writing, printing and publication of the words complained of have gone beyond the bounds of decency and were an act of sensationalism solely motivated by a desire to boost the sale of the official newsletter and to live off the loss of the plaintiff's reputation, not only were the defendants callous of conduct but also indifferent to promulgating injurious falsehood and oblivious to the fact that the words are untrue and that the said words were calculated to disparage the plaintiff in his profession, the 1st, 2nd and 5th defendants shifted their stand from "satire", "fantasy" and "not a report on human beings or actual happenings" to the word being "gurauan" (a joke). It is my judgment that if a man in jest conveys a serious imputation, he jests at his peril. The question therefore is always, how were the words understood by those to whom they were originally published, assuming that they were persons of ordinary intelligence? We must assume too, that they gave to ordinary English words their ordinary English meaning and to local or technical phrases, their local or technical meaning.

In answer to the plaintiff's plea that he has in consequence been gravely injured in his character, credit and reputation and has been brought into public scandal, odium and contempt the 1st, 2nd and 5th defendants in their amended defence launched a fresh attack in the following words:

> … the estimation of the general public started to appear despicable and full of hatred caused by the plaintiff's own doing in writing on the behaviour of the former Deputy Prime Minister with words not reflecting the custom, culture, tradition of the Malays or the Muslim in this country.

Those words in their natural and ordinary meaning, meant and were understood to mean that the plaintiff was hated and disliked for his book on the behaviour of Dato' Seri Anwar Ibrahim and that the words used in the book did not reflect the custom, tradition and culture of the Malays.

Having considered all issues and the defences raised by the defence, I am satisfied that the plaintiff had indeed proved his case against the defendants.

Damages

In their defence the 1st, 2nd and 5th defendants denied even receiving the letter of demand before action was commenced. However during cross-examination the 2nd defendant admitted receiving the said letter of demand. No man may disparage or destroy the reputation of another and every man

has a right to have his good name maintained unimpaired. This right is a *jus in rem*, a right absolute and good against all the world. The article complained of, has certainly injured the plaintiff's reputation. From the nature of the words themselves, being written, published and printed, they have disparaged the plaintiff and had brought him into hatred, ridicule and contempt. I find that these words are actionable *per se*.

General damages are such as the law will presume that ought to follow the natural or probable consequences of the defendants' conduct. They arise by inference of law, and need not therefore be proved by evidence. Such damages are recoverable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted. It is my judgment that damages are presumed, as in the present case, where the words are actionable *per se*.

In awarding damages the court must consider the circumstances attending the publication, the falsity of the words used, the malice contained in the publication, the mode of publication, the extent of the circulation of Harakah, the fact that the defendants deviated from their pleadings and the lack of an apology, and the denial and subsequent confirmation of the receipt of the letter demanding the apology.

Having considered all aspects I find that a sum of RM200,000 would be sufficient to compensate the plaintiff as against the defendants. I have not considered the 4th defendant as he has not been represented before me. I do not think that this is a proper case to consider aggravated or exemplary damages. The plaintiff knew that by embarking on a controversial subject such as the former Deputy Prime Minister, he would no doubt be the target of those who no doubt still feel sympathetic towards Dato' Seri Anwar Ibrahim. This is the risk he took when he launched his book at the UMNO General Assembly. The award will bear interest at 4% per annum from date of publication of the impugned article to date of judgment and costs.

The Preliminary Objection

There is one other issue for me to consider. Counsel for the 1st defendant raised a preliminary objection at the commencement of the trial. He contended that pursuant to s. 9(c) of the Societies Act 1966 (the Act) the plaintiff ought not to have sued PAS. The said s. 9(c) reads as follows:

9. Provisions applicable to registered societies.

The following provisions shall apply to registered societies –

…

(c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society;

I dismissed the preliminary objection and ordered the trial to proceed. Encik Hanipa has again raised this same issue because he was of the view that since no order regarding my earlier dismissal has been filed and extracted it was still open for me to review my decision on this point. Order 2 r. 2(1) of the Rules of the High Court 1980 (the RHC) reads as follows:

2 Application to set aside for irregularity

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

It is my judgment that the 1st defendant ought to have entered conditional appearance upon being served with the writ and ought to have forthwith applied to strike out the writ under s. 9(c) of the Act. It is too late in the day to take this objection. Whilst I agree that the 1st defendant had raised this in the defence, by allowing the suit to proceed to trial, the 1st defendant has indeed waived its right to object. I have no hesitation in reaffirming my earlier dismissal of the said objection bearing in mind the provision of O. 2 r. 2(1) of the RHC.